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No. 95-275

In The

Supreme Court of the United States

October Term, 1995

COEUR d'ALENE TRIBE,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should certiorari be granted when the district court applied properly the same legal standard that Petitioner seeks now to have this Court announce on appeal?

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Sup. Ct. Rule 15, Respondent files this brief in opposition to the petition for a writ of certiorari.

ADDITIONAL STATUTES INVOLVED

15 U.S.C. § 1171. The pertinent text to this statute is set forth in Respondent's appendix.

STATEMENT OF THE CASE

The question resolved below was whether the Coeur d'Alene Indian Tribe may conduct casino gambling on its reservation when casino gambling is prohibited in the State of Idaho.

Article III, § 20 of the Idaho Constitution expressly declares that all gambling is contrary to the public policy of the state and is strictly prohibited, except for three specific, narrow exceptions: the state lottery, pari-mutuel betting if conducted in conformity with enabling legislation, and charitable bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes:

> GAMBLING PROHIBITED. (1) Gambling is contrary to public policy and is strictly prohibited except for the following:
>
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
>
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
>
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.

Idaho Const. art. III, § 20.

Contrary to assertions in Petitioner's brief, the Idaho Constitution also expressly forbids those engaging in the three carefully limited exceptions from employing any form of casino gambling, including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and slot

machines or from employing any electrical or electromechanical imitation or simulation of any form of casino gambling. In this regard, art. III, sec. 20 of the Idaho Constitution provides:

> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat], keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

In Idaho, even charitable organizations are prohibited from conducting "casino nights" or any other form of casino gambling. They can only conduct bingo and raffles.[1]

Art. III, sec. 20 of the Idaho Constitution goes on to mandate the legislature to provide penalties for violations of the prohibition against gambling. Accordingly, Idaho Code § 18-3801 provides that those who engage in gambling (other than participation in the three specific,

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[1] Petitioner makes the novel argument that because the Idaho Constitution provides that gambling does not include "games that award only additional play," casino games that do award money or property should also be construed to be consistent with the public policy and criminal laws of the state. Petitioner's brief at 26. We note that federal law also recognizes the same distinction as the Idaho Constitution. The Johnson Act also defines "gambling device" to include various devices only if one can receive "money or property" from their operation. 15 U.S.C. § 1171. In *U.S. v. 294 Various Gambling Devices*, 718 F. Supp. 1236, 1248 (W.D. Penn. 1989), the district court pointed out that games that award only "free games" are not gambling devices under the Johnson Act.

narrow exceptions allowed under the Idaho Constitution) shall be guilty of a misdemeanor.

On April 15, 1992, Petitioner Coeur d'Alene Tribe, pursuant to the Indian Gaming Regulatory Act ("IGRA"), asked Respondent State of Idaho to enter into negotiations for a tribal-state compact governing Class III gaming activities on the Coeur d'Alene Reservation. As noted in the district court's opinion at pp. 16-19 of the appendix to Petitioner's brief, IGRA governs gaming on tribal reservations. It divides gaming into three classes. Class I gaming encompasses traditional forms of Indian gaming used in connection with tribal ceremonies. Class I gaming is under the exclusive jurisdiction of the tribes. 25 U.S.C. § 2710(a)(1). Class II gaming, such as bingo and pull-tabs, are subject to the requirements of IGRA and to the oversight of the National Indian Gaming Commission. 25 U.S.C. § 2710(b). Class III gaming activities, the gaming activities at issue here, include all traditional forms of casino gambling, or the electronic or electromechanical equivalent thereof. Class III gaming activities can only be conducted if the games are authorized by tribal ordinance, the tribe is located in a state that permits such gaming activities and the gaming is conducted in conformance with a tribal-state compact entered into between the tribe and the state. 25 U.S.C. § 2710(d)(1). IGRA's approach to Class III gaming is essentially to respect state public policy and criminal laws which prohibit particular gaming activities.

After the opening of negotiations in the summer of 1992, the Governor of Idaho called a special session of the Idaho Legislature which drafted a proposed amendment to art. III, § 20 of the Idaho Constitution to clarify Idaho's

prohibitory stance against gambling in general and casino gambling in particular. Casino gambling has never been permitted in Idaho, and there has never been a legally authorized casino in this state. The proposed amendment clarifying Idaho's strict prohibition against this kind of gambling passed overwhelmingly in the November 1992 election. Following a challenge by the Nez Perce Tribe, the amendment was upheld by the Idaho Supreme Court as having been properly presented for voter approval. *Nez Perce Tribe v. Cenarrusa*, 867 P.2d 911 (Idaho 1993).

The state and tribe entered into a compact authorizing the tribe to conduct the types of Class III gaming activities not prohibited by the Idaho Constitution and criminal laws of the state. Petitioner's brief, App. at 66-67. The parties also agreed to a declaratory judgment action to determine if the tribe could conduct games not permitted by state laws. Petitioner's brief, App. at 64-66. Petitioner had expressed its intent to engage in extensive Class III gaming activities, including casino-style gambling, that are prohibited under Idaho law and public policy. Respondent's position was that because these activities were strictly prohibited in Idaho, Respondent was not required, under IGRA's terms, to negotiate these gaming activities in the compacting process.

Petitioner filed its declaratory judgment action in federal district court. Petitioner's argument was two-fold. First, Petitioner contended that the amended state constitution and current Idaho law should not apply to Petitioner's negotiations with Respondent. Rather, Respondent should be bound by the law as it existed prior to November 1992, when the electorate ratified the constitutional amendment. Second, Petitioner asserted

that, under IGRA's provisions concerning Class III gaming, if Respondent State of Idaho allowed any form of Class III gaming at all in the state, Petitioner must then be allowed to engage in all Class III gaming.

The district court rejected Petitioner's arguments. The court first held that IGRA did not prohibit Idaho from amending its constitution or changing its laws. Nor, according to the district court, did Petitioner have a vested right in the law as it existed prior to the 1992 election. "The Tribes offer no authority to support their claim that IGRA precludes a state from changing its gaming laws prior to entering into a compact." Petitioner's brief, App. at 23. Consequently, the relevant state law was Idaho's current constitutional and statutory provisions. Worth noting is that Idaho did not allow casino gambling before the 1992 amendment, either.

The district court then applied the *Cabazon* criminal/prohibitory and civil/regulatory analysis to the facts before it to determine whether casino gambling was required under IGRA to be included within the compact negotiation process. The so-called *Cabazon* standard was first set forth by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). While *Cabazon* was a Public Law 280 case (Public Law 280 is codified as amended in 18 U.S.C. § 1162, 28 U.S.C. § 1360), the *Cabazon* analysis has since been overlaid by a number of circuits onto cases involving Class III gaming under IGRA. Because IGRA only allows "Class III gaming activities" that are "permit[ted]" within the state in which the Indian lands are located, the *Cabazon* test has been used to determine whether a state permits or prohibits the Class III gaming activity at issue and, consequently,

whether that gaming activity is a proper subject of negotiations between the state and the tribe.

In this case, the district court relied heavily on the *Cabazon* analysis and, after a lengthy review of the *Cabazon* opinion and precedent from other circuits, the court concluded that Idaho prohibited gambling generally and casino gambling in particular. The court also found that gambling, including all forms of casino gambling, was contrary to the express public policy of the state. The court concluded that, based on "the combined IGRA and *Cabazon* analysis," Respondent did not have to negotiate with Petitioner over casino gambling.

Petitioner appealed to the Court of Appeals for the Ninth Circuit. The court of appeals affirmed the district court's judgment, stating "the judgment of the district court is affirmed substantially for the reasoning advanced in its opinion. . . . " Petitioner's brief, App. at 2. The court of appeals also affirmed "in part" based on its holding in *Rumsey Indian Rancheria of Winturn Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994). Petitioner sought a rehearing *en banc* which was denied. This petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

In this case, the district court surveyed all of the outstanding precedent available and concluded that it would reach the same result under the precedent from all the circuits. Subsequently, the Ninth Circuit Court of Appeals issued an intervening decision with which Petitioner disagrees. Petitioner asks this Court to grant certiorari to overturn the intervening precedent even though

the district court already applied the test Petitioner now demands that this Court announce on appeal. Moreover, the district court applied that standard properly and in accord with precedent from the other circuits. Therefore, this is not an appropriate case in which to grant certiorari.

ARGUMENT

BASED ON THE FACTS AND RECORD IN THIS CASE, THIS CASE IS NOT AN APPROPRIATE VEHICLE TO RESOLVE ANY PURPORTED SPLIT IN THE CIRCUITS CONCERNING IGRA

The crux of Petitioner's argument is that because the Ninth Circuit Court of Appeals did not apply the *Cabazon* civil/regulatory and criminal/prohibitory analysis to Class III gaming in *Rumsey Indian Rancheria of Winturn Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994), while the Second Circuit Court of Appeals did apply it in *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990), the Supreme Court should grant a writ of certiorari in Petitioner's case to resolve that difference and hold the Ninth Circuit's reasoning in *Rumsey* in error. However, the record in this case, which Petitioner has carefully avoided in its brief, is countervailing. This case is not *Rumsey*, which was not decided when the district court issued its opinion, and in this case the district court did apply the *Cabazon* analysis to the facts before it. Moreover, the district court's reasoning was expressly affirmed by the court of appeals. While there may be a split on the narrow issue of whether the *Cabazon* analysis should be applied to Class III gaming negotiations under IGRA, that

split has nothing to do with this case. The *Cabazon* analysis that Petitioner requests was, in fact, already applied by the district court, putting Petitioner in the untenable position of requesting that this Court issue a writ of certiorari and impose a legal standard that has already been applied at the district court level. This is not a good use of judicial resources.

When the district court decided this case, *Rumsey* had not yet been issued. The district court based its decision on what scope of Class III gaming must be negotiated on the language of IGRA, IGRA's legislative history, precedent from other circuits and the facts before it. Importantly, guided by precedent from other jurisdictions, the district court carefully applied the *Cabazon* civil/regulatory and criminal/prohibitory analysis when it rendered its decision.

The district court noted that when Congress enacted IGRA, it made the following finding:

> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and *is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.*

25 U.S.C. § 2701 (emphasis added). The district court went on to discuss the Class III gaming that Petitioner intended to operate on its reservation, including numerous forms of casino gambling such as card and dice games, baccarat, roulette, keno and slot machines and all other traditional forms of casino gambling or their electronic or electromechanical equivalents that are expressly prohibited by the Idaho Constitution and criminal laws.

The district court turned to the language of IGRA regarding Class III gaming. This language provides:

> Class III gaming activities shall be lawful on Indian lands only if such activities are . . . authorized by [tribal] ordinance or resolution . . . located in a State that permits such gaming for any purpose by any person, organization, or entity, and . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . .

25 U.S.C. § 2710(d)(1).

To determine the meaning of the phrase "located in a State that permits such gaming" and the scope of Class III gaming that must be negotiated under that provision, the district court exhaustively reviewed the history of IGRA and, in particular, the pre-IGRA *Cabazon* decision. The district court addressed at length the criminal/prohibitory and civil/regulatory distinction articulated in *Cabazon* and, after noting that the *Cabazon* decision was discussed in the legislative history of IGRA, concluded that "it is clear that the prohibitory/regulatory analysis contained in *Cabazon* must guide the court in resolving this dispute. Therefore, the court must evaluate Idaho law and public policy on gambling." Petitioner's brief, App. at 22. It is clear from this language that the district court used the *Cabazon* standard that Petitioner now requests to resolve what gaming activities had to be negotiated.

After concluding that the *Cabazon* standard should be applied to current Idaho law and not the law as it existed prior to 1992, the district court turned to the business of

applying the standard. The *Cabazon* standard is as follows:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub L 280's grant of criminal jurisdiction, but if the state law generally permits the conduct as issue, subject to regulation, it must be classified as civil/regulatory and Pub L 280 does not authorize its enforcement on an Indian reservation. *The shorthand test is whether the conduct at issue violates the State's public policy.*

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987) (emphasis added).

Applying this standard, the district court concluded that gambling, and in particular casino gambling, was against the express public policy of Idaho and was prohibited by the state:

> The Idaho Constitution expressly declares that all gambling is contrary to public policy and is strictly prohibited, except for three carefully limited exceptions: the state lottery, parimutuel betting if conducted in conformity with enabling legislation, and bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes.[10] In addition, the Idaho Constitution expressly forbids those engaging in the three carefully limited exceptions from employing any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and slot machines, or from employing any electrical or electromechanical imitation or simulation of any form of casino gambling.

> The Idaho Constitution further declares that the legislature shall provide for penalties for violation of the prohibition against gambling. Accordingly, Idaho Code § 18-3801 provides that those who engage in gambling (other than participation in the three exceptions allowed under the Idaho Constitution) shall be guilty of a misdemeanor.
>
> [10] Once permitted under Idaho law, charitable organizations are now prohibited from conducting casino nights or any form of casino gambling.

Petitioner's brief, App. at 36. The district court held that "under the combined IGRA and *Cabazon* analysis, the State must negotiate with the tribes only as to the conduct of a lottery and pari-mutuel betting on horse, mule and dog races. The state is not required to negotiate as to any other forms of Class III gaming." *Id.*, App. at 37.

To avoid the record in this case, Petitioner asserts that the district court, while claiming to apply the *Cabazon* standard, in fact ignored it. The district court's well-reasoned opinion belies this assertion. This Court has repeatedly said that a state's public policy "is to be ascertained by reference to the laws and legal precedent." *Muschany v. United States*, 324 U.S. 49, 66 (1944). The district court carefully reviewed the laws of the State of Idaho and, based on the state's constitutional prohibition against gambling in general and casino gambling in particular and the criminal statutes of this state, the district court properly concluded that under *Cabazon*'s "shorthand test," the activities Petitioner sought to negotiate violated the public policy of Idaho. Consequently, they did not have to be negotiated under IGRA.

However, Petitioner further seeks to avoid the district court's application of *Cabazon* by arguing that other jurisdictions that have applied *Cabazon* have held that if a state permits one form of Class III gaming then "all gaming or broad categories of gaming are negotiable." No circuit has so held. The district court addressed this issue thoroughly when it was raised by Petitioner below and pointed out that *Cabazon* has never been applied by any court in the manner Petitioner suggests. Rather, in those states in which Class III gaming is generally permitted and merely regulated, tribes have prevailed under a *Cabazon* analysis as to the types of games permitted or regulated. But, where Class III gaming activity was criminally prohibited and against public policy, as in Idaho, the tribes have never been found to have a right to engage in the prohibited gaming activity. Indeed, after reviewing the cases cited by Petitioner, *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991); and *Ysleta Del Sur Pueblo v. Texas*, 852 F. Supp. 587 (W.D. Tex. 1993), *rev'd on other grounds*, 36 F.3d 1325 (5th Cir. 1994), the district court found that "all of the cases uniformly support[ed] the position taken by the State" and that there was no authority for the proposition that under a *Cabazon* analysis, a state's public policy construed as permitting a single Class III game must be found to permit all Class III gaming activities.

The district court's review of the opinions cited by Petitioner was exceptionally thorough. It is contained at

pp. 26-37 of the appendix to Petitioner's brief. Not only does this discussion dispel Petitioner's assertion that the district court incorrectly applied *Cabazon*, it also reveals the extent to which Petitioner has exaggerated the purported split between the Ninth and Second Circuits on the scope of Class III gaming negotiations. For example, in *Mashantucket*, while the Second Circuit Court of Appeals, unlike the Ninth Circuit Court of Appeals in *Rumsey*, applied a *Cabazon* analysis to determine what the scope of the Class III gaming negotiations should be, it did not hold, as Petitioner suggests, that if a state allows any form of Class III gaming, all Class III gaming is subject to negotiation with the tribes. Rather, in *Mashantucket*, the Second Circuit held that because Connecticut already allowed casino gambling for charitable purposes, Connecticut had to negotiate with the tribes regarding casino gambling. While the Ninth Circuit Court of Appeals may differ from the Second Circuit on whether to apply the *Cabazon* analysis to the scope of Class III gaming negotiations, both courts looked at what gaming the state permitted to determine what gaming the tribe could conduct. In fact, the Ninth Circuit pointed out in *Rumsey* that it agreed with the Second Circuit's conclusion in *Mashantucket*. *See Rumsey*, 41 F.3d at 428, n.4.[2]

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[2] The other cases cited by Petitioner to the district court and to this Court also do not support Petitioner's assertion that courts applying the *Cabazon* test hold that permitting one type of Class III games means all types of Class III games must be allowed. Again, the district court's reasoning in this case, at pp. 26-37 of the appendix to Petitioner's brief, is informative. For example, in *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990), one of the cases Petitioner cited to the district court, the court held only that because South Dakota

In terms of this case, more important than Petitioner's exaggeration of the difference between the Ninth and Second Circuit Courts of Appeals' approach to the scope of Class III negotiations, is that here the split Petitioner asserts makes no difference. Because *Rumsey* had not been issued when the district court decided this case, the district court applied the very standard Petitioner now demands, the *Cabazon* standard, and Petitioner lost. Petitioner's brief, App. at 4-45. Moreover, the district court applied the *Cabazon* standard properly, in the same fashion as it has been applied by other courts. Applying this standard, the district court correctly concluded that gambling generally and casino gambling in particular is prohibited by Idaho law and against Idaho public policy and, therefore, not a proper subject of negotiation under IGRA.

Traditionally, absent plain error, this Court defers to the interpretation of state law given to it by lower federal

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permitted commercial card games, including blackjack, the Indian tribe could also conduct a blackjack operation. In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991), the state constitution authorized a state lottery and did not prohibit any forms of gaming. The court in that case concluded the state had to negotiate gaming that was "not prohibited expressly by the Wisconsin Constitution or state law." *Ysleta Del Sur Pueblo v. State of Texas*, 852 F. Supp. 587 (W.D. Tex. 1993), the Fifth Circuit case Petitioner cited to the district court to support its position, has since been reversed by the Fifth Circuit based on the Eleventh Amendment. However, as the district court in this case explained, *Ysleta* also did not support Petitioner's characterization of the *Cabazon* test, but instead held only that since Texas already permitted casino gaming, it must negotiate with the tribes over casino gaming.

courts. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985). The district court's review of Idaho law was not erroneous and was expressly affirmed by the court of appeals. This particular case does not involve either a split in the circuits or an important federal question. Rather, it is a fact-bound/record-bound case in which the district court thoroughly reviewed, under the very standard Petitioner now demands, Idaho law and public policy and concluded Respondent should prevail. The *Rumsey* decision may be ultimately appealed to this Court.[3] If it is, at least the issue Petitioner raises will be implicated by the case. But, that issue is not implicated here. Given the facts and record in this case, Respondent respectfully asks that the petition for a writ of certiorari be denied.

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[3] On August 11, 1995, the *Rumsey* decision was amended and the suggestion for rehearing *en banc* was rejected. The tribe in *Rumsey* has until November 9, 1995, to file a petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals to the Ninth Circuit should be denied.

Dated this 15th day of September, 1995.

Respectfully submitted,

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APPENDIX

15 U.S.C. § 1171. Definitions

As used in this chapter –

(a) The term "gambling device" means –

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property, or

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property;. . . .